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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SYLVIA OCHOA, Defendant and Appellant.	G040264 (Super. Ct. No. 07CF3375) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William Lee Evans, Judge. Affirmed.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Collette C. Cavalier, Heather F. Crawford and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Sylvia Ochoa of one count of possessing cocaine base with intent to sell, in violation of Health & Safety Code section 11351.5. Ochoa asserts the judgment should be reversed because the court failed to provide, sua sponte, a "unanimity" instruction (Judicial Council of Cal. Crim. Instns. (2008), CALCRIM No. 3500). Ochoa also contends there is not substantial evidence in the record to support the judgment. Finally, Ochoa accuses the prosecutor of misconduct in her closing argument. We disagree with each contention and affirm the judgment.

FACTS

Only three witnesses testified at trial: Juan Rivera, an eyewitness, and the two police officers who responded to the scene and arrested Ochoa and her codefendant, Carlos Mendeta. On the night of October 9, 2007, Rivera observed a group of individuals congregating in a parking lot across the street from his residence. Over the course of an hour, Rivera saw approximately six cars pull up to the curb across the street, briefly park, and then leave after one member of the assembled group had approached the car and engaged in some form of contact with the cars' occupants. Rivera believed the group was selling drugs and his wife called the police to report the suspicious activities.

Detective Dominic Padilla and Officer Sergio Gutierrez responded simultaneously in separate cars to the 1600 block of Walnut Street, Santa Ana, California — a location known as a drug trafficking site. Padilla and Gutierrez saw a group of between seven to 10 individuals clustered together; the group immediately scattered in all directions upon the approach of the police cars. The occupant of a car parked at the curb, who had appeared to be conversing with members of the group, drove away, veering away from the approaching police car.

Ochoa and Mendeta together walked quickly away from the group, in a direction that brought them closer to the approaching police vehicles. Officer Gutierrez

observed Ochoa "release her arm from [Mendeta's arm], separate herself by several feet from him and she looked back over at [Mendeta] for a moment, then looked at [Officer Gutierrez,] and twisted her torso toward [Officer Gutierrez's] direction and kind of puffed her chest up." As Ochoa puffed her chest up, her arms moved out to the side slightly. At the same time, Officer Gutierrez saw Mendeta look at him, then move his left hand across his body and toss a small object over a short fence into the front yard of a residence. Ochoa and Mendeta moved back together after the toss and they continued walking down the sidewalk. The officers detained Ochoa and Mendeta. In the driveway of the adjoining residence, Officer Gutierrez found a sandwich bag containing what was later confirmed to be 2.4 grams of cocaine base. No drugs were found in Ochoa's possession.

After Ochoa and Mendeta were in custody, Detective Padilla interviewed Rivera and conducted a "field showup," in which Rivera identified Ochoa and Mendeta as two of the individuals he had observed loitering across the street. According to Detective Padilla's recollection, aided by the report he completed the night of the arrest, Rivera told him that Ochoa would walk from the sidewalk up to cars, contact the occupant of each car and make a brief exchange with her hands, then walk back to the curb and stand with Mendeta. Rivera said he was 100 percent sure of his identification of Ochoa and Mendeta. The prosecution relied on Rivera's statement to Officer Padilla on the night of Ochoa's arrest as evidence Ochoa was participating in the sale of drugs as a "runner," i.e., an individual going between buyers (who were arriving in cars) and sellers who were standing in the parking lot or on the sidewalk.

At trial, Rivera testified that Mendeta and Ochoa were physically present near the group he observed, but were not the individuals involved in what he perceived to be the distribution of drugs. Rivera indicated he had seen a blond woman who was a part of the group of individuals loitering in the parking lot, and the blond woman was not Ochoa. On the night of the incident, Ochoa had dark hair with blond highlights. Rivera

testified he could not recall what he told police about Mendeta and Ochoa on the night of their arrest, but that he was truthful when he spoke with Officer Padilla. Neither Mendeta nor Ochoa testified, and neither called any witnesses other than Rivera to testify on their behalf.

After the prosecution's case was presented, Ochoa and Mendeta each moved for judgment of acquittal as a matter of law under Penal Code section 1118.1. Denying Ochoa's motion, the court commented: "[I]f the jury chooses to believe the . . . prior recorded statement that Mr. Rivera gave to [Officer Padilla,]" "then what they would have before them is some evidence that Ms. Ochoa did go to a car, . . . that something occurred between them and the car[, maybe] hand-to-hand something, . . . maybe words . . . , then came back to Mr. Mendeta who's standing on the curb. [¶] So as to dealing with Ms. Ochoa only[,] absent that evidence[,] she is walking down the street with somebody else who pitches drugs. So in order to convict Ms. Ochoa they would have to accept that testimony from Mr. Rivera that she undertook some kind of action at the street."

The prosecutor contested the court's view of the case against Ochoa: "I also believe that there is another theory under which the jury could find Ms. Ochoa guilty and that is based upon . . . the blocking movement that was testified to by Officer Gutierrez. And, therefore, even if [the jury] disregard[s] or disbelieve[s] the testimony of the original report of Juan Rivera, I do believe also that it is possible for them to find her guilty under that theory." The court disagreed: "Sounds like aiding and abetting somebody destroying evidence as opposed to possession for sale if you believe all of that. Okay. Well, choose your theory." The court and parties moved on to other issues, and discussion as to whether the prosecution needed to "choose" its theory does not appear again in the record.

Ochoa did not request the court to provide a "unanimity" instruction (CALCRIM No. 3500). Nor did Ochoa's counsel request the court to explicitly instruct

the jury that it must believe the evidence pertaining to her alleged actions as a "runner" to convict her of aiding and abetting possession of cocaine base with intent to sell, and could not base a conviction of Ochoa solely on evidence she "blocked" Officer Gutierrez's view of Mendeta. The jury was provided with several standard instructions pertaining to aiding and abetting liability, CALCRIM No. 400 and CALCRIM No. 401.

The prosecutor, in her closing statement, elucidated her view of the evidence: "So what I have to show is how [Ochoa] did any one of these things; aid, facilitate, promote, encourage, or instigate. Let me show you how she did that. There [are] two different ways. First of all, she acted as a runner. . . . This is assuming that you can see clearly into the original report by Mr. Rivera. In other words, what he reported on the night of [the incident] to Detective Padilla. He reported basically that she acted as a runner for these drug deals. She approached the cars." "If you want to use this idea that she acted as a runner, that is aiding and facilitating in the possession for sales, is it not? That is how she directly aided and facilitated. If you don't like that one and you just have a problem with Mr. Rivera's testimony, she still is guilty of aiding and abetting Mr. Mendeta, and this is how, because she tried to block the toss." "Don't you think that . . . promotes and encourages the activity when you're trying to keep someone from being caught? Of course it does." Ochoa's counsel did not object to the prosecutor's statements and the court did not comment upon the statements.

In her closing argument, Mendeta's attorney focused on the difference between Rivera's testimony and Rivera's purported statement to the police: "The same stuff [Rivera] told us here on the stand regarding what he saw Mr. Mendeta do and saw Ms. Ochoa [do] is the same thing he said to my investigator 12 days later, a conversation that occurred in Spanish all of which Mr. Rivera told you. That is not a recanting witness." The prosecutor subsequently stated in her rebuttal closing argument: "When [counsel for Mendeta] stood up here she said that Mr. Rivera's testimony was not that he just didn't recall, but that he specifically said, no, I didn't say that to the police. You can

go back in the transcript, you're not going to find that anywhere." "More importantly, with regard to Mr. Rivera's testimony is the fact that you did not hear any evidence to the contrary from a defense investigator. If the defense investigator could have refuted what he had to say when he said, 'I don't recall what I told your defense investigator,' either that defense investigator is subject to subpoena, he could have been called to the stand if he had anything different to say. That is not evidence that is in front of you." An objection was made, but the court overruled the objection "in light of the nature of the arguments to be made."

The jury found Ochoa and Mendeta guilty as charged. In a bifurcated proceeding, the court found to be true all three prior prison term allegations against Ochoa. The court suspended Ochoa's upper-term sentence of five years in state prison and placed her on three years probation, including 365 days in county jail. The court also struck the one year terms it had imposed based on its prior prison term findings.

DISCUSSION

Unanimity Instruction

Ochoa argues the court erred by failing to provide, sua sponte, a unanimity instruction to the jury.[1] Ochoa reasons that the prosecution introduced evidence of two discrete acts: (1) her back-and-forth networking between the loitering group of individuals in the parking lot and individuals inside cars parked along the sidewalk (based on the statements of Rivera on the night of Ochoa's arrest); and (2) her body

[1] CALCRIM No. 3500, modified to fit the facts of this case, states: "The defendant is charged with [possession of cocaine base with intent to sell in Count One, sometime during the night of October 9, 2007]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act [she] committed."

movements occurring simultaneously with Mendeta's attempt to dispose of the cocaine base (based on the testimony of Officer Gutierrez).

"It is established that some assurance of unanimity is required where the evidence shows that the defendant has committed two or more similar acts, each of which is a separately chargeable offense, but the information charges fewer offenses than the evidence shows." (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 611-612 (*Sutherland*).) "Therefore, cases have long held that when the evidence suggests more than one discrete crime [but the defendant has not been charged with every crime suggested by the evidence], either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*); see, e.g., *People v. Norman* (2007) 157 Cal.App.4th 460, 465-467 [unanimity instruction required when evidence of separate instances of theft both argued to the jury as proof the defendants committed the single alleged count of theft].) A unanimity "instruction is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed." (*Sutherland*, *supra*, 17 Cal.App.4th at p. 612.)

Conversely, "where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty." (*Russo*, *supra*, 25 Cal.4th at p. 1132.) For instance, "no unanimity instruction is required to prevent a less than unanimous verdict where the evidence independently proves acts which support the defendant's liability either as a principal or as an aider and abettor." (*Sutherland*, *supra*, 17 Cal.App.4th at p. 617, *id.* at pp. 618-619 [forgery counts supported by evidence defendant forged the instruments herself and/or "uttered" the instruments (by vouching for the genuineness of the checks to another person)]; see also *People v. Maury* (2003) 30 Cal.4th 342, 422-423 [regardless of which act of violence by defendant actually killed his

victim, all of his actions were part of one murder]; *Russo, supra*, 25 Cal.4th at pp. 1135-1136 [no unanimity required with regard to multiple possible overt acts in prosecution for conspiracy to commit murder]; *People v. Davis* (1992) 8 Cal.App.4th 28, 32-33, 45 [no unanimity required as to whether defendant participated directly in a robbery or only aided and abetted by staying in the getaway car].)

Similarly, "[a] unanimity instruction is not required if the evidence shows one criminal act or multiple acts in a continuous course of conduct." (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292 [stalking offense consists of continuous course of conduct and multiple acts by defendant could support single offense without unanimity instruction]; see also *People v. Sanchez* (2001) 94 Cal.App.4th 622, 630-634 [unanimity instruction not required for counts of animal cruelty based on theory of continuing abuse].)

There is no dispute in this appeal that the direct perpetrator, Mendeta, completed an independent substantive offense, possession of cocaine base with intent to sell. This appeal pertains to Ochoa's alleged status as an aider and abettor. Penal Code section 31 extends equal criminal liability as principals in a crime to "[a]ll persons concerned in the commission of a crime," including those who "aid and abet in its commission." (*Ibid.*) "[P]roof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus — a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea — knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus — conduct by the aider and abettor that in fact assists the achievement of the crime." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.) "Factors to be considered by the trier of fact in determining 'whether one is an aider and abettor include presence at the scene of the crime, failure to take steps to attempt to prevent the commission of the crime, companionship, flight, and conduct before and after the crime.'" (*People v. Garcia* (2008) 168 Cal.App.4th 261, 273.)

We conclude there was no need for a unanimity instruction. "Possessory drug offenses are continuing crimes that extend throughout a defendant's assertion of dominion and control over the drugs . . . ." (*People v. Bland* (1995) 10 Cal.4th 991, 995.) Ochoa could only be convicted of one count of possessing cocaine base with intent to sell because the evidence established Mendeta committed only one crime of possessing cocaine base with intent to sell. This is not a case in which the prosecution introduced evidence that Ochoa aided and abetted two separate violations of Health & Safety Code section 11351.5 (e.g., by aiding and abetting two different codefendants who possessed two different quantities of drugs). Ochoa's alleged conduct all occurred on one night, at one location, within the course of less than two hours, and with respect to one codefendant and one quantity of drugs. It is artificial to sharply divide Ochoa's actions into two discrete acts. Ochoa aided and abetted Mendeta by accompanying Mendeta at the scene of the crime, acting as a runner, fleeing alongside Mendeta, and attempting to block Mendeta's toss of the drugs. Her liability derives from the single count of possession by Mendeta supported in this record, and her single course of aiding and abetting conduct supported in the record.

Sufficiency of Evidence

Ochoa also contends the evidence is insufficient to support her conviction for aiding and abetting Mendeta's possession of cocaine base with intent to sell. We review the entire record in the light most favorable to the judgment and decide whether there exists substantial evidence from which any rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Chatman* (2006) 38 Cal.4th 344, 389.) Where the evidence of guilt is primarily circumstantial, the standard of review is the same. (*People v. Holt* (1997) 15 Cal.4th 619, 668.)

There is substantial evidence in the record to support Ochoa's conviction. The jury could believe the police accurately reported Rivera's comments from the night

of the incident, and could further believe Rivera's comments on that night were true. In addition, Officer Gutierrez's testimony suggesting Ochoa escorted Mendeta away from the parking lot and then attempted to block Officer Gutierrez's line of sight while Mendeta tossed the bag of cocaine base supports the jury's finding.

We disagree with the premise that the jury could not convict Ochoa in the absence of the evidence obtained from Rivera. If the jury disregarded the evidence based on Rivera's purported statement to police, there is still sufficient evidence in the record to convict Ochoa of aiding and abetting Mendeta's possession with intent to sell. It is true that mere presence at the scene of the crime is not sufficient to show aiding and abetting liability. (See *People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 744.) But Ochoa's alleged "blocking" maneuver, in tandem with her presence at the scene and assistance to Mendeta in fleeing the scene, supports her conviction. (Cf. *People v. Cooper* (1991) 53 Cal.3d 1158, 1164-1169 [getaway driver can be held liable as principal for aiding and abetting robbery so long as the crime has not been completed prior to the getaway driver's participation].)

Prosecutorial Conduct

Ochoa also insists the prosecutor committed misconduct by allegedly mischaracterizing evidence and improperly shifting the burden of proof to the defense in her rebuttal closing argument. Ochoa claims the prosecutor suggested Rivera could not recall anything about his conversations with a defense investigator when in fact Rivera stated he could not recall only some of the things he discussed with the defense investigator. Ochoa also claims the prosecutor improperly shifted the burden of proof by pointing out the defense had not called the defense investigator to testify at trial.

When a claim of prosecutorial misconduct focuses on comments made by the prosecutor to the jury, "'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable

fashion.'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.) We do not think any misconduct occurred. The prosecutor slightly overstated Rivera's lack of memory about what he had told the police on the night of the incident and what he discussed with the defense investigator. The prosecutor's statements were fair in light of Rivera's repeated assertions that he could not recall (or partially recalled with some uncertainty) details of his conversations concerning this case. We also note the prosecutor invited the jury to "go back in the transcript" to confirm his description of Rivera's testimony, effectively reminding the jury that it was their duty to decide what the evidence established.

Finally, it was not improper for the prosecutor to comment on the defendant's decision not to call a witness who logically would have supported the defense's theory of the case. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1339; *People v. Medina* (1995) 11 Cal.4th 694, 755.)

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.